FOUR GERMAN JURISTS. IV.

BRUNS, WINDSCHEID, JHERING, GNEIST.

VIII.

THE jurists whose work has been examined in the preceding papers of this series[1] confined themselves, in the main, to teaching and writing. Gneist's activities were more varied: he was at once professor, author, judge and politician, and in each of these callings he attained distinct eminence. He taught at the University of Berlin for forty-six years, and during this period his lectures were attended by nearly fifty thousand students.[2] He wrote almost as many books, pamphlets and articles as Bruns, Windscheid and Jhering together,[3] and his writings brought him recognition as the first publicist of Germany, if not of the Continent.[4] He held judicial office for nearly thirty years; he was a member during the last two decades of his life of the highest administrative court of Prussia; and during his last twelve years he sat also in the Prussian Privy Council. He took an active part in Prussian and German politics; he was a member, for more than thirty years, of the Prussian Chamber of Deputies and for seventeen years of the Imperial Diet also; and he was recognized as a leader of the right wing of the Liberal party.

Like Bruns, Windscheid and Jhering, Gneist began teaching

[1] POLITICAL SCIENCE QUARTERLY, X, 664; XI, 278; XII, 21.

[2] In 1886, when Gneist had completed his forty-seventh year of academic service, the records of the University showed that more than forty thousand students had subscribed for his courses. (Walcker, Rudolf von Gneist, p. 11.) In February, 1888, Gneist was appointed instructor of the present Emperor (then Prince) William in constitutional and administrative law.

[3] A list of the chief publications of each of the four jurists was given in POLITICAL SCIENCE QUARTERLY, X, 664, 665.

[4] The esteem in which Gneist was held by his professional brethren is indicated by the fact that he was for twenty years president of the German Bar Association. — Walcker, p. 12.

and writing in the field of Roman private law. He offered the customary Romanistic courses at the University, and he published in 1845 a work, which is still regarded as valuable, upon *The Formal Contracts of Modern Roman Law.*[1] But a lively interest in public problems and a strong desire to aid in solving them were already drawing him out of private life and away from private law. He belonged, both on the father's side and on the mother's,[2] to that official class which for more than a century had been the only political class in Prussia; and the conditions of the period (1840–48) were such as to excite political interest among all educated men. The rhetorical phrases of Frederick William IV upon his accession to the throne had fired the public imagination and had aroused hopes of the establishment of constitutional government. The acts and omissions of the king during the following eight years converted the elation of expectancy into the anger of disappointment. During these years Gneist added to his Romanistic courses lectures on criminal law and procedure, in no wise confining himself to the exposition of existing law, but insisting on the necessity of its reform: advocating, in particular, public and controversial as against secret and inquisitorial procedure, and decision by the verdict of an independent jury. These were, at the time, political questions, and their discus sion involved or, at least, facilitated the discussion of many other political questions.[3] Gneist's next publications were the outcome of these courses of lectures: they treated of duels and of juries.[4]

Immediately before the disturbances of 1848 and the establishment of constitutional government, Gneist entered political life at the only point then open, by seeking and obtaining election to the municipal assembly of Berlin. In 1848 and in

[1] Die formellen Verträge des neueren römischen Obligationenrechts. In 1858 he published a pamphlet dealing with a special question in the same field, De causae probatione stipulatoris, and also a Syntagma of the Institutes of Gaius and of Justinian.

[2] *Cf.* Walcker, pp. 9, 10.

[3] *Cf.* Bornhak, "Rudolf von Gneist," *Archiv für öffentliches Recht*, XI, 2, p. i.

[4] Der Zweikampf und die germanische Ehre, 1848; Bildung der Geschworenengerichte, 1849.

1849 he stood for election to the Prussian National Assembly and to its successor, the Prussian Chamber of Deputies ; but in both cases he was defeated by the Radical candidate.[1] In the movements of 1848 and 1849 he accordingly participated only in the modest positions of municipal assemblyman and member of the civic militia, which, however, gave him opportunity to exercise a moderating influence at several decisive moments.[2] The only immediate literary result of these experiences was a description of the conditions that obtained in Berlin during the revolution.[3]

At this time, as indeed throughout his life, Gneist was a moderate Liberal. The central article of the Liberal program was the demand for constitutional government, which meant representative government created by popular elections, after the English fashion. But the imitation, in France and other European countries, of English parliamentary institutions had not yielded the desired and anticipated results. Wherever continental constitutionalism had established government by party, the outcome had been partisan government. Instead of securing the liberty of the individual, it had merely substituted for the arbitrary rule of the crown the equally arbitrary rule of changing ministries. Instead of securing peaceful progress, it seemed to beget an alternating series of executive usurpations and popular revolutions. So now again, in due course, the Revolution of 1848 was followed, in France, by the *Coup d'État* and the Second Empire ; in Prussia, by a period of reaction, guided and utilized by the landed aristocracy. As long as these experiments and failures were confined to Latin Europe, German writers were at no loss for a theory that should exculpate constitutionalism; but when similar phenomena revealed themselves in Germany, it became clear that the constitutional theory must be reëxamined.

[1] Walcker, p. 12; Bornhak, p. ii. Gneist's statement that he declined a summons to the national assemblies of that time (History of the English Constitution, Author's Preface, p. iv), although it apparently refers to the years 1848 and 1849, must actually refer to the years immediately following.

[2] Bornhak, p. ii.

[3] Berliner Zustände von März 1848 zu März 1849.

To this task Gneist addressed himself, withdrawing from active political life[1] and abandoning his judicial career.[2] As a pupil of Savigny and a faithful adherent of the historical school, he of course went back of continental constitutionalism to its English prototype and proceeded to study the English constitution in its historical development. Some of the preliminary results were given to the public in a paper read before the Berlin Scientific Union in March, 1853, which was expanded, by the addition of notes, into a pamphlet of a hundred pages, *Nobility and Gentry in England*.[3] At this time Gneist had already convinced himself that the English constitution could not be comprehended or explained apart from the English system of administration, and to the study of this system he devoted the next three years of his life. Much of this work he afterwards declared was like an excursion through a primeval forest.[4] The administrative law was the unknown part of the English law; in fact, the English lawyers had not even a name for it. English historians had not yet brought out the facts necessary to elucidate its development. Blackstone, a century before, had blazed a path into the wilderness, but Freeman and Stubbs had not yet cut roads, and Gneist was obliged to struggle through "the chaos of disconnected antiquarian matter piled up around Blackstone's commentaries," the English statutes and Parliamentary reports and the decisions of the English courts.[5] The result of these pioneer labors was Gneist's *magnum opus*, his *English Constitutional and Administrative Law*. It first appeared in two volumes, in 1857 and 1860, and was ultimately expanded into four volumes of nearly three

[1] He made no further attempt to enter political life until 1859. *Cf. supra*, p. 643, note 1.

[2] His resignation of his judicial office in 1850 was primarily a protest against the reactionary policy of the Prussian government. If it had not been offered then, it certainly would have been offered later; for a man of Gneist's character and opinions could not have submitted to the influence which the administration exercised upon the judiciary during the period of reaction (in 1850–58) and the period of conflict (1862–66). He resumed his judicial career in 1875.

[3] Adel und Ritterschaft in England.

[4] History of the English Constitution, Preface, p. v; Verwaltungsrecht, II, p. v.

[5] *Ibid.*; Verwaltung, Justiz, *etc.*, Vorwort, p. 6; Rechtsstaat, pp. 258, 259.

thousand pages, published between 1871 and 1884.[1] Printed in the form in which our less rugged branch of the Teutonic family handles its solid literature, the number of pages and of volumes would be doubled.

Gneist claimed that he had solved the problem which he had undertaken to solve, that he had discovered why parliamentary government worked well in England and badly or not at all on the Continent. He found the solution, not wholly in the differences between the Teutonic and the Latin peoples, and not at all in any difference between the English and the German peoples, but in certain political and legal institutions which had been developed in England, but were lacking in Latin Europe and were only imperfectly developed in Germany. There were differences, he recognized, between the Teutonic and the Latin peoples, — differences which made the establishment of constitutional government among the latter more difficult, — but these differences, he believed, were largely the result of their different institutions. In its administrative and judicial institutions especially England had solved the chief problems of public law — "problems which had made

[1] The first part of the work, Geschichte und heutige Gestalt der Aemter in England, 1857, was expanded in 1867 into two volumes, entitled Das englische Verwaltungsrecht, of which the first volume gave the history and the second the modern law. This was again expanded into three volumes: Englische Verfassungsgeschichte, 1882, and Das englische Verwaltungsrecht der Gegenwart, Allgemeiner Theil, 1883; Besonderer Theil, 1884. Das englische Parliament in seinen tausendjährigen Wandlungen, 1886, covers to a large extent, but in a more popular way, the same field as the Englische Verfassungsgeschichte. Only these two historical volumes have been translated into English. The History of the English Constitution, translated by Ashworth, was published in two volumes in 1886 (2d ed., 1890). The History of the English Parliament has been twice translated, by Shee and by Keane, and each of these translations has run through several editions. Gneist read the proof of Keane's translation.

The second part of the original work, Die heutige englische Communalverfassung und Communalverwaltung oder das System des Selfgovernment, 1860, was expanded in 1863 into two volumes, and appeared in its third and final edition in 1871 in one volume, under the title Selfgovernment, Communalverfassung und Verwaltungsgerichte in England. Of this part there is a French translation: Constitution communale de l'Angleterre, traduit par Hippert, 5 vols., 1868–70.

A condensation of the entire treatise into an article (which, however, would make a very respectable English octavo volume) may be found in Holtzendorff's Encyclopädie der Rechtswissenschaft (5th ed., 1890), pp. 1377–1478.

Germany doubt and France despair" — as adequately as Rome had solved the chief problems of private law.[1] The trouble with continental constitutionalism was that English public law had been received only in part, and that the part which had been ignored was the necessary basis of the part that had been selected.

These convictions gave to Gneist's literary work, from 1857 on, a propagandist character. He did not advocate a general imitation of English institutions; he maintained that in many respects the Prussian institutions were better than the English. He did not advocate the simple transfer to his own country of any English institution, for he recognized that every nation must develop its polity along its own lines. He advocated the recognition and acceptance of the principles which he found embodied in certain English institutions and the development, in accordance with those principles, of equivalent Prussian and German institutions. In this way, he believed, it would be possible to organize a German constitutional state which should improve upon the English model. In the first edition of his *English Constitutional and Administrative Law* the missionary spirit was clearly discernible: he emphasized throughout the differences between English and continental institutions and the points in which the former were superior. In the last edition of the *Administrative Law* he added to the title the words "in comparison with the German administrative systems." During the thirty-six intervening years he published several books and many pamphlets and articles which were simply longer or shorter tracts for the dissemination of sound constitutional theories. In 1864, in an article of a hundred pages on the *Representative System in England*,[2] he made a first attempt to popularize his views. In 1869 he published, for the benefit of the legal and official classes, an elaborate comparison between the English, French and German administrative and judicial systems; and since nearly every subsection on Prussian conditions concluded

[1] Verwaltung, Justiz, *etc.*, p. 3; Verwaltungsrecht, p. 4.

[2] Das Repräsentativsystem in England, in Haxthausen, Das Constitutionelle Princip, II, 87–180.

with suggestions *de lege ferenda*, the work presented a complete program of reform. In spite of its uncouth title, *Administration, Justice, Recourse to the Courts, Central Administration and Self-government*,[1] the book reached the classes for which it was written ; and when, ten years later, Gneist assured us, his students, — not naïvely, but with an admirable detachment of his public from his private personality, — that this book had "made an epoch," he did not exaggerate its importance. Another attempt to influence German legal opinion was made by him in 1871, in an address of welcome delivered on behalf of the Berlin Juristic Society to the legal members of the first German Parliament. This address was published in 1872, under the title of the *Jural State*.[2] In special studies, moreover, regarding city and county government, public schools, taxation, the budget, the organization of the bar, judicial procedure and the powers of the courts,[3] — studies published, as a rule, when the topics treated were under legislative consideration, — Gneist drew upon the reservoir of political wisdom which he had found walled up within the English public law, and sent its vivifying waters trickling over the arid fields of the German *Polizeistaat*.

In this mass of scientific and controversial literature there is an amount of repetition that is very wearisome to the reader of to-day — repetition not only of facts and conclusions, which was inevitable under the circumstances, but of words and

[1] I translate only a part. The full title is: Verwaltung, Justiz, Rechtsweg, Staatsverwaltung und Selbstverwaltung nach englischen und deutschen Verhältnissen.

[2] Der Rechtsstaat und die Verwaltungsgerichte in Deutschland. A second enlarged edition appeared in 1879. There is an Italian translation by del Artom, Lo Stato secondo il diritto, 1885.

[3] For example: Das englische Grundsteuersystem (an advance instalment of his Englische Communalverfassung), 1859; Soll der Richter auch über die Frage zu befinden haben, ob ein Gesetz verfassungsmässig zu Stande gekommen? 1863; Budget und Gesetz, nach dem konstitutionellen Staatsrecht Englands, 1867; Freie Advocatur, die erste Forderung aller Justizreform in Preussen, 1867; Die Selbstverwaltung der Volksschule, 1869; Die preussische Kreisordnung, 1870; Vier Fragen zur deutschen Strafprocessordnung, 1874; Ueber den Entwurf einer deutschen Strafprocessordnung, 1876; Zur Steuerreform in Preussen, 1878; Gesetz und Budget, constitutionelle Streitfragen aus der preussischen Ministerkrisis, 1879; Zur Verwaltungsreform und Rechtspflege in Preussen, 1880; Die preussische Finanzreform durch Regulirung der Gemeindesteuern, 1881.

phrases also. Gneist, however, would have deemed it a waste of time to search for different ways of saying the same thing. If he found it necessary to describe again occurrences or tendencies which he had described before, he did it in the same words as before; and when he had settled on the phrase which to him best expressed a certain idea, he used it not only to the end of the chapter but to the end of his life. He was preaching to a nation a political gospel, line upon line, precept upon precept, and simple iteration deepened the impression without blurring it. No collection of his miscellaneous writings has been made, nor is it likely that posterity will demand one; but selections from these writings are preserved in condensed and imperative form in the laws of Prussia and in those of the German Empire.

The character of Gneist's writings makes it easy, in spite of their great volume, to disengage the principal political ideas which they contain; but to make these ideas completely intelligible to English or American readers it is necessary, in many cases, either to abandon Gneist's form of statement, at the risk of failing to give full expression to his thought, or to explain the peculiar sense which he attached to certain words and phrases—a sense so different from that in which we commonly employ them as to make his language, to other than German readers, obscure or even misleading. When, for example, he described certain tendencies in a nation as "social," he did not mean that they made for the good of the nation, but the opposite: they were tendencies which we should describe as anti-social. Neither did he mean that they were socialistic: on the contrary, the tendencies which he reprehended as social were, in most cases, tendencies of the property-holding classes. Behind his use of the words "society" (*Gesellschaft*) and "social" (*gesellschaftlich, social*) lay a whole system of social philosophy.

This system was not of his own making. For a German, Gneist was not much of a philosopher. His aims were highly practical, and his close touch with life as a judge and a politician checked, in his case, that tendency to the overvaluation

of abstract concepts which was so common in Germany in the nineteenth century. Regarding "philosophic constructions" in public law he occasionally used language as disrespectful as that employed by Jhering regarding similar constructions in private law. The constructions, however, which Gneist disliked were those of the older natural-law type. Constructions that were, or seemed to be, based upon "positive knowledge of things"[1] — constructions, especially, that were derived from the study of history — were as attractive to him as to the other members of the German historical school. In the writings of Lorenz Stein he found a social philosophy which appealed to him and which he thenceforth used. It was from Stein's point of view that he originally approached the study of English constitutional history,[2] and to the end of his life he expressed his political ideas in Stein's phrases.[3] For this reason, and also because of its intrinsic interest, Stein's system deserves a somewhat careful examination.

IX.

Stein's social philosophy was elaborately set forth in 1850, in his *History of the Social Movement in France*,[4] a study of the French revolutions from 1789 to his own time. The value which the author attached to concepts is indicated by his remark that "the knowledge of human things differs from other knowledge in that the single facts have no value if

[1] History of the English Constitution, Preface, p. iv.

[2] *Cf.* Adel und Ritterschaft, p. 55; Der Rechtsstaat, p. 333; History of the English Constitution, Preface, p. iv. *Cf.* also Gneist's letter to Stein, published in Haimerl's Oesterreichische Vierteljahresschrift für Rechts- und Staatswissenschaften, XVIII, Literaturblatt, p. 56.

[3] Die nationale Rechtsidee von den Ständen und das preussische Dreiklassenwahlsystem, 1894, *passim*. The English reader will find an elaborate restatement of Stein's theories in the first portion of Gneist's English Parliament.

[4] Geschichte der socialen Bewegung in Frankreich von 1789 bis auf unsere Zeiten. The work consists of three volumes with separate titles: I. Der Begriff der Gesellschaft und die sociale Geschichte der französischen Revolution bis zum Jahre 1830. II. Die industrielle Gesellschaft: der Socialismus und Communismus Frankreichs von 1830 bis 1848. III. Das Königthum, die Republik, und die Souveränetät der französischen Gesellschaft, seit der Februarrevolution 1848. A second edition, from which I quote, was published in 1855.

they be not comprehended in the unity of a concept."[1] His concept of the state is thoroughly Hegelian: the state is "the community (*Gemeinschaft*) manifesting itself in its personality as will and act."[2] The state, however, is not the only form in which the community manifests itself; in its economic organization it possesses "an equally solid, equally vast and equally powerful organic unity,"[3] and this unity is society (*Gesellschaft*). Stein's state and Stein's society are in perpetual conflict, because they represent opposing principles. The principle of the state is to secure the highest possible development — *i.e.*, the greatest possible wealth, power and intelligence — of all its individual members, because the degree of development attained by its members is the measure of the development attained by the state itself. The state must desire, further, that each of its members participate in forming its will, both on its own account, because the sum of human insight is always greater than the greatest insight of any individual, and on account of the individual, because of the educating and elevating influence of political liberty. The principle of the state, therefore, demands progress through liberty towards equality; and in pure theory, as Stein recognized, the democratic republic is the ideal form of the state.[4]

Stein's society, *i.e.*, the community in its economic organization, exhibits tendencies precisely contrary to those of the state. Property, which is at once the product of labor and the basis of further production by labor, invariably concentrates itself in the hands of a part of the community; and those members of the community who have only labor power become dependent on those who have property. Family and inheritance perpetuate this inequality and divide society into more or less permanent classes; and the propertied class strives, more or less consciously, to perpetuate and increase its own power and the dependence of the laboring class. Class interest is the active principle of society, and its necessary tendency is through inequality toward the destruction of liberty.

[1] Begriff der Gesellschaft, p. xii. [2] *Ibid.*, p. xv. [3] *Ibid.*, p. xxviii.
[4] Das Königthum, die Republik, *etc.*, pp. 133 *et seq.*

What now is the course and what is the outcome of this conflict of tendencies, or, to use Stein's own language, of this antithesis of principles? As soon as we descend from the airy region of concepts and consider actual conditions, the field of conflict is shifted and the character of the conflict is changed. The conflict is not fought out between state and society; for the state, regarded as an organization independent of society, is "a pure concept."[1] No such state has ever existed. The actual state is always based on society, and it is always controlled by society. This control is inevitable, because the state can will and act only through individuals, and every individual brings with him into his activity as legislator or administrator the views and tendencies of his social class. More precisely, the control of the state by society is its control by the propertied class, because in this class is chiefly to be found the ability required for public office. This rule of the propertied class, however, is not inconsistent with the principle of the state. That principle does not require the abolition of the social order, but only the effort to raise the dependent and unfree into independence and freedom. What is distinctly contrary to the principle of the state is the misuse of the power of the state by the propertied class to perpetuate the dependence of the laboring class and to make it impossible for members of that class to struggle up into the ruling class. To this misuse of political power, however, the ruling propertied class is always prone. It not only denies to those who have no property any active participation in the state, but it shapes law and administers government in its own interest.

Changes in the organization of the state, whether they are accomplished by reform or by revolution, are always the result of a want of correspondence between the political and the economic organization of the community. They are caused by the fact that those who have wealth, and are thus socially independent, are excluded from participation in the state. When the change is accomplished by revolution, the holders of new wealth commonly secure the aid of the laboring class by

[1] Begriff der Gesellschaft, p. xlviii.

preaching liberty and equality; but in the end this class is excluded, as before, from political power. Without social (*i.e.*, economic) independence, political liberty is impossible.

In the actual world, accordingly, the conflict for liberty must be waged in society; and the prize aimed at must be, not liberty for all, which is unattainable, but the chance of liberty. The principle of the state shrinks to the modest demand that the possibility of acquiring property and influence in the state shall be kept open for the laboring and subject class. But how is even this end to be realized, when its realization involves the sacrifice, by the propertied and ruling class, of a part, at least, of its class interests? It is hinted, early in the discussion, that the solution is to be found in a principle higher than that of the state or that of society — in the principle of the community. In Stein's philosophy the community is the higher unity which comprehends both state and society; and while the tendency of the state is toward the independence of all its members, and that of society towards the dependence of the majority of its members, the principle of the community is the interdependence of all its members.[1] If labor is dependent on property, property in turn is dependent on labor. Property yields income only through the coöperation of labor. Harmonious coöperation cannot be secured, if the members of the laboring class work without hope of bettering their position. It is, accordingly, in the interest of property that labor shall yield to the laborer something more than the mere necessities of existence. This higher interest, it must be admitted, is seldom recognized by the propertied class, because the immediate and obvious interest of this class lies in the exploitation of the laboring class. Its members, however, may be somewhat enlightened by agitation; and social reforms that are really in its own interest, as well as in that of the laboring class, may be carried through by legislation. This is where the state comes in again, and particularly the state with a king at its head. The hereditary king stands above society and is therefore in a

[1] "Das für einander Vorhandensein der Einzelnen in der Vielheit ist die Gemeinschaft." — Begriff der Gesellschaft, p. xiv.

better position than any other human being to conduct reform movements to a successful issue; and if the king undertakes this task, monarchy, even in a constitutional state, may preserve something of the substance of political power.[1]

Stein's society, the reader will note, is as pure a concept as his state. It is an abstraction, like the "economic man"; it is, in fact, the sum of all the members of the community considered as economic beings. Such an abstraction is perfectly legitimate. It may be a useful counter in our social reckoning. Its usefulness, however, depends upon the way in which it is used. The use made by Stein of this particular abstraction is to discover the tendency of economic society. This society is studied in action, and particularly in its action upon the state. As soon, however, as its action is examined, we perceive that it is never the whole body that acts: it is always a class, and usually the propertied class. To term the interests and tendencies of this class "social" is inexact and confusing, because it suggests that they are the interests and tendencies of the entire body. Stein not only does this, he goes further: he actually accepts this self-suggestion. Because the chief interest of the dominant propertied class, which is domination, tends to prevail over the chief interest of the dependent laboring class, which is independence, the interest of the former class, disguised under the generic term "class interest,"[2] is declared to be "the active principle" of economic society; and the result of the conflicting interests and tendencies of the two classes, *viz.*, the increasing dependence of the laboring class, is declared to be the tendency of that society. In other words, a tendency which manifests itself *in* economic society is presented as a tendency *of* that society. This is hardly worthy of a philosopher who has undertaken to comprehend the facts of human life "in the unity of a concept," since it is in fact from the duality of his concept[3] that his results are derived.

[1] Begriff der Gesellschaft, pp. xxxvii, xxxviii; Das Königthum, die Republik, *etc.*, pp. 45–49.

[2] *Cf.* Begriff der Gesellschaft, pp. xl, xli.

[3] It is singular that Stein should not have perceived that he was using the word "society" in two senses, for the double meaning with which he charged it

This criticism, however, touches the form rather than the essence of Stein's theory. Stripped of its philosophical trappings, his theory gives us, primarily, an estimate of the tendencies of man as an economic being acting in an economic organization, *viz.*, the class. The theory, however, does not stop here. It considers also the tendencies of man as a citizen, acting in the state; and it takes into account, however slightly and inadequately they are presented, the tendencies of man as a moral being, acting in the community. Finally, the theory indicates, not formally in any one passage but by assertion and implication in many passages, the resultant of all these different tendencies; and this is the triumph, all along the line, of the economic side of human nature. The propertied class, which is dominant not only in the economic organization of the community but also in its political organization, does not feel or think or act politically or morally, but always economically. It rules in the state but it does not consider the ends of the state. It is the only factor that counts in the community, but even as a portion of the community it is unaffected by sympathy or conscience or any other moral influence, except when the line of conduct supported by such feelings happens to coincide with its own ultimate interests. The theory assumes the prepotency of economic interests in determining the conduct of the individual, and derives from this assumption the supremacy of the interests of property in society, state and community.

Gneist constantly used Stein's phrases and never, to my knowledge, wrote or spoke of Stein's system with anything but

involved him in contradictions. His society is distinguished from his state in that the state is personal, while society is impersonal; in that the state has a will, while society has none. But in one passage we are told that both state and society "will definite ends" ("wollen ein Bestimmtes" — Begriff der Gesellschaft, p. xxxiii); and in another passage — that in which the principle of society is first formulated (p. xxxviii) — the question is put: "How can that which is impersonal have a principle of action?" and this question is begged by the answer that society acts through individuals. Stein here forgot that he had said the same of the state, — that it acts only through individuals, — and he failed to answer the question he had just proposed, which was really: "How can the economic organization determine the direction of its action, *i.e.*, how can it will?" The explanation of these contradictions is, of course, that when he speaks of society as willing or acting, he is thinking of the dominant class.

approval; but he made significant additions which rendered his own system much less one-sided. To the political and economic organizations of the community he always added the ecclesiastical. The Christian church is a make-weight against the undue power of wealth; like the state, it makes for liberty and equality and resists the exploitation of the poor. It does this, at least, as long as it is true to its mission.[1] Like the state, the church is liable to be captured and controlled by society, *i.e.*, by property interests; but this is a pathological, not a normal, condition; and when it occurs, there is likely to be a reformation.[2] The same is true of the state: it is not normally controlled by property interests. In Gneist's theory, as in Stein's, it is natural that the propertied classes shall rule in the state; but, according to Gneist, it does not follow that they shall rule the state itself, making its power subserve their economic interests. If they do this, there is likely to be a reassertion of the idea and of the power of the state. In Gneist's system church and state stand over against society as independent factors, influenced indeed by the social basis on which they rest, but themselves influencing society and, in case of need, building their social bases anew.[3] The church educates men to morality; the state trains them to political consciousness. Both deal, in their work, with instincts quite as deeply rooted in human nature as are the economic instincts. Gneist's writings differ greatly from Stein's in the value ascribed to duty as a motive. In Stein's book moral considerations are rarely mentioned; and when they are mentioned, they are presented as the cloak of class interests. To Gneist, duty was as imperative as it was to his countryman Kant, and he assumed that it appealed in a similar way to his fellows.[4]

[1] Rechtsstaat, pp. 5–13; Eigenart des preussischen Staats, p. 6; History of the English Constitution, I, 84, 104; II, 699, 700; Stände und Wahlsystem, pp. 15 *et seq.*

[2] Gneist accounted for the Protestant Reformation in this way. — Rechtsstaat, p. 100; Eigenart des preussischen Staats, pp. 8, 9; Stände und Wahlsytem, pp. 46 *et seq.*, 174 *et seq.*

[3] See, especially, Stände und Wahlsystem, pp. 15, 170.

[4] "In the coarsest man, deep sunk in selfishness and materialism, we often see an unexpected awakening of sympathy and conscience and a return to the fulfillment of human duties." — Rechtsstaat, p. 328. *Cf.* Stände und Wahlsystem,

There are other points of difference on which I can only touch. In Stein's system, no special place is made for the educated class. "Spiritual goods" are recognized, but they are treated merely as means for obtaining material goods; and it is assumed that, as soon as the clergy and the other professional classes acquire property, their sentiments and tendencies become substantially identical with those of landholders and capitalists. In Gneist's writings, much greater importance is attached to the educated class. Not only is the clergy treated as something more and something other than a section of the propertied class, but the same view is taken of the professional officials of the state and of the professional classes generally. Finally, while there are in Stein's system but two really important classes, the Haves and the Have-nots, in Gneist's books there is discernible, between wealth and poverty, a middle class, and to this class is attached something of the importance usually attributed to it by writers on politics.

X.

Of all the additions which Gneist made to Stein's theory, that on which he most insisted is the power of the state to make men political — to imbue them, as he expressed it, with the "consciousness of the state" or, more simply, with "practical knowledge of the state and the right feeling for it."[1] It is able to do this by holding them to the personal performance of public duties. If it so shapes its institutions as to draw into its service all of its citizens who are capable of serving it, it will succeed in educating to its ends not individuals only but whole classes. If it distributes the burdens of its service according to the capacity of its citizens to bear them, the heaviest burdens will fall upon property. If it gives political power to those who bear its burdens in proportion to the burdens borne, it will intrust governmental authority chiefly

pp. 12–16. When Freund (Thaten und Namen, p. 20) asserts that Gneist regards men as the slaves of purely egoistic motives, he is misled by Gneist's uncritical use of Stein's phrases.

[1] History of the English Constitution, II, 438.

to the propertied classes. These, however, under such a system, do not rule as propertied classes; they rule by right of service.[1] They may misuse their power, at times, to promote the interests of the classes to which they belong, but they will not do so in the long run, for by the habitual performance of public duties they are trained to "right feeling." This is Gneist's "harmony of state and society"; and this, and not conflict, is the normal relation between his society and his state.

It follows that social classes are not, as Stein maintained, purely economic products. In harnessing them into its service the state modifies not merely their instincts and aims, but their structure. In England, for example, as Gneist pointed out in his first work on English constitutional development,[2] the country gentry and the burgesses were brought together by the state into a single class, the Commons; and this he pronounced the most striking event in English history. The organization of society by the state and for the state is not only possible, it is necessary; and the chief problem of the modern state is to find the proper organization (*Ordnung*) of modern industrial society.

It follows, again, that in a properly organized state parties are not social, as Stein regarded them, but political; that they do not represent conflicting class interests, but divergent views concerning public policy. The appearance of purely social parties is a symptom of disease in the body politic; it indicates the necessity, to use Gneist's own phrase, of a "recombination (*Wiederverbindung*) of state and society," *i.e.*, a readjustment of services and powers, duties and rights.

As a means of educating men to right views of the state and the right feeling for it, nothing, in Gneist's opinion, can take

[1] According to Gneist, the propertied classes have never obtained power in the state by their wealth merely, nor even by the superior intelligence that is commonly associated with wealth. They have always had to earn power by service, and ordinarily they have served for generations before their position in the state has obtained legal recognition. They may indeed retain the power thus acquired for generations after they have ceased to serve; but sooner or later the state will be so reconstructed as again to apportion power according to service, rights according to duties. *Cf.* Eigenart des preussischen Staats, p. 14.

[2] Adel und Ritterschaft, pp. 32–34.

the place of habitual personal service[1] — not the press, nor meetings, nor any other expression of so-called public opinion, nor even frequent elections. The press can only reproduce and emphasize, for each social class or group, its own thoughts, which are the expression of its own interests. Public meetings bring together only those who are already in sympathy and agreement.[2] In a community untrained by public service, what is called public opinion is only class opinion; there is no public opinion. A semblance of public opinion may be created by concealing inconsistent views and divergent tendencies under platform phrases[3]; but when the attempt is made to translate these phrases into facts, it becomes evident that they represent no "energetic total will."[4] Voting has no intrinsic educational value: "never in all the centuries have mere elections produced political sense or capacity for public activity."[5] Election is essentially a social device, a method by which groups of men associated for common purposes find agents to do their will. It is the method, for example, by which the joint-stock company organizes itself and obtains officers. To the citizen whose public activity is confined to paying taxes and voting at elections, the state may well seem a larger joint-stock company. There is nothing in the mere process of voting

> to enlighten men as to the difference between voluntary associations and political unions — between associations for what one can do and wishes to do, and unions for what one ought to do and must do. . . . For every people that is relieved of the burdens of direct and personal public activity, there is an empty space between the state and the individual — a void that is not to be filled by the reflection of individuals, nor by the interchange of thoughts in speech or writing, nor by the combination of these thoughts into philosophic systems.[6]

What Gneist most admired in the English polity and was most eager to see imitated in his own country was the way in

[1] "For the individual who confronts the state without responsible and personal activity in the service, the ego is the central point of the commonwealth. The existence of coördinate rights, views and interests is ignored." — Verwaltung, Justiz, *etc.*, p. 115. [2] *Ibid.*, p. 60.

[3] *Ibid.*, Vorwort, p. vii; Repräsentativsystem, p. 166; Rechtsstaat, pp. 241, 245.

[4] Repräsentativsystem, p. 158. [5] *Ibid.*, p. 161. [6] *Ibid.*, p. 160.

which England had utilized the services of the propertied classes in county and local government: the landed gentry acting as county magistrates, the yeomen and burgesses serving on juries and filling the parish offices and both meeting periodically at quarter sessions. The administration which they conducted—as it existed in the days before the first Reform Bill and still exists in part—Gneist termed "self-government," because the officials were not sent in by the central government but were selected from among the people of the locality, and because they did their work in an independent way with little intervention on the part of the ordinary courts and no interference on the part of the central administration. He was careful not to describe the system as "local" self-government, for he was especially anxious to have it understood that the functions intrusted to it were not solely or even mainly local. English self-government, he insisted, had never been anything but a branch of the general administration of the state.

> The county, borough and parish authorities are not empowered to develop and shape a local militia system, a local administration of justice, a local poor relief and local taxes, according to their own judgment and the local interests: all that they do is to discharge as officers and organs of the state the duties of the state as determined by law.[1]

Logically accordant, in Gneist's view, with this relation was the fact that the authorities of county and parish government were appointed, not elected; that the acceptance of office was compulsory, and that service was unpaid. All classes served the state according to the measure of their capacity because it was their duty. In the "honorary office" (*Ehrenamt*) Gneist saw the fullest and final expression of the just relation between wealth and service and between service and power. Election and voluntary and paid service were to him "social principles"; appointment and compulsory and unpaid service, political principles.

[1] Repräsentativsystem, p. 153.

Gneist admired English self-government, further, because it was government according to law and thus constituted the firm substructure of the "jural state." Bit by bit, as he pointed out, all the details of local administration that were capable of legal regulation had been regulated by acts of Parliament, until by the patient labor of centuries England had obtained the most complete and most minutely detailed administrative law in the world. Hand in hand with this development went the transformation of the local offices into "jurisdictions." As the duties of the county authorities came to consist more and more in the application of written laws, these authorities became more and more judicial in their character. As police magistrates, the justices of the peace were judicial officers from the outset; but they were also charged with many administrative duties. In the discharge of these duties, in so far at least as their discharge affected the private rights of individuals, the procedure of the justices was surrounded more and more with the guaranties of judicial procedure: it was made formal, public and controversial. The most important result of this transformation was the protection of the individual against the misuse of administrative power; but a secondary result was an increase in the educational efficacy of self-government. All public service is of educational value, but the highest value attaches to service in the administration of the law, whether as juror or justice, because such service develops the sense of fair play.[1]

In all administration there is necessarily a wide field of discretion; and not all the functions intrusted to English county

[1] Some of Gneist's German critics have accused him of idealizing the English justices of the peace — of ascribing to them a freedom from class prejudice and a spirit of fairness which they did not possess. They have cited statements made by English writers, conveying a much less favorable judgment regarding these magistrates. *Cf.* Bornhak, p. xvii, citing Macaulay; also Freund, Thaten und Namen, p. 16, note 2. Gneist, however, instituted no comparison, as do these writers, between the English justices of the peace and the salaried professional judges either of England or of other countries. He compared their administration of police justice, from the fourteenth century to the nineteenth, with the manorial jurisdiction exercised simultaneously by the great landed proprietors on the continent, and he found it incomparably fairer and less oppressive. He compared them

and parish authorities were susceptible of detailed legal regulation. In English self-government guaranties against the abuse of discretionary powers were sought (and, as Gneist believed, found) in the social position of the justices of the peace, in the sense of fairness developed in what was practically a life tenure of a quasi-judicial position and in the principle of joint action in all matters of importance.

The result of this whole development was decentralization of the most admirable sort: not decentralization of legislation, which is autonomy, but decentralization of administration. Under the laws enacted by Parliament and interpreted by the ordinary courts, English county and local government was practically self-controlling. The ordinary courts retained jurisdiction in questions of law; but in questions of fact and in matters of discretion the decisions of the justices of the peace in quarter sessions were final. The crown and its ministers ceased to interfere at all with the course of county and local administration, and Parliament ceased to intervene otherwise than by legislation. The local independence thus established was historically the result of the fact that the county authorities were socially independent by reason of their rank and wealth, and politically independent because they received no pay. The man who works without pay will commonly work in his own way or not at all. To these elements of strength must be added what Gneist called the "collegial" organization of the justices of the peace, *i.e.*, their constant association with each other at sessions and in boards, and the resultant *esprit de corps*.

as administrators with the paid officials who conducted the local administration in France and in Germany in the eighteenth and nineteenth centuries, and he conceded that they did not always do their work as efficiently; but this disadvantage was more than counterbalanced, in his opinion, by their independence, which made it difficult to use them as instruments of party policy. He compared, above all, the class to which they belonged with the landed aristocracies of France and Germany; and he found in the English gentry a sympathy with other classes, both in country and in town, a desire for even-handed justice to all, high and low, a respect for law and a sense of duty to the community, which he did not find developed to anything like the same degree among the seigneurs of France or the Junkers of Prussia.

It was on this system of self-government, as Gneist constantly insisted, that the whole parliamentary system of government in England rested. Representation in Parliament was not granted to persons inhabiting a certain arbitrarily defined district; it was granted to neighborhoods organized for self-government. Parliamentary suffrage was not given to individuals as a natural right; it was given to those who discharged political duties. It was not given to property as such; the possession of property imposed duties of service, and the duty of service carried with it electoral right. Constituencies associated in self-government and educated by continual personal service, members of Parliament trained for the state by lifelong service in honorary offices, a people fitted for self-government in gross by self-government in detail — these were the elements that made parliamentary government possible; and parliamentary government, which is of course party government, was shielded against the sins which most easily beset it by the fact that the whole sphere of internal government was practically removed from ministerial control. These views of the character and the significance of English self-government so pervade all Gneist's writings that any selection of particular citations is at once difficult and unnecessary. One striking passage, however, deserves notice.

In the English administrative organism it is the intermediate structure of self-government which gives to the whole tension and life and to the single parts political independence. As it proceeded out of absolutism, so English administration would revert to the absolute form if the activity of the higher and middle classes in the self-administration of state functions should be brought to an end. After taking out this intermediate structure nothing would be left but a bureaucratized police-state.[1]

[1] Verwaltung, Justiz, *etc.*, p. 91. It may be noted that Gneist attributed the capacity of the American people for self-government to the institutions which the colonists brought with them from England, and particularly to the fact that American administration is so largely conducted by the people and not turned over to professional officials. Of our political capacity Gneist had a high opinion, founded largely, as he once told me, on his observation of his American students in the fifties. At that time he had in his lectures a considerable number of students from the South as well as from the North, and he repeatedly contrived to get them together at his own house and to set them to discussing the slavery question.

The changes in this system that began in 1832 with the first Reform Bill and have continued to our day were, in Gneist's opinion, ill-advised and unfortunate. He recognized fully that the accumulation of new wealth unrepresented in Parliament necessitated a reform of the suffrage, but he disapproved of the innovation by which suffrage was made to depend upon a naked property qualification, without corresponding duties of personal service.[1] He recognized fully that some parts of the English internal administration had worked badly; but he believed that the defects could have been remedied without abandoning the principle of the compulsory unpaid services of the propertied classes. The occupation of the field of local government by a host of professional paid officials and the extension of central administrative control that accompanied this invasion, meant to him the passing of that old England that he admired. The collection of men untrained by personal service into elected councils which had only appointing, tax-voting and supervisory functions, and which could not intelligently exercise the latter functions because of their lack of practical experience — this was to him not self-government. The movement seemed to him an overrunning of the state by society.[2]

In these discussions he was much struck by the fairness and good temper shown on both sides. In his later writings he expressed a less favorable judgment regarding the development of our institutions.

[1] He believed that the difficult problem of the suffrage — a problem especially difficult in the cities — could have been solved by introducing the Prussian three-class system, making the members of the first two classes (those who pay two-thirds of the total direct taxes) liable not only to jury duty but to compulsory service in "honorary offices," and causing the members of the third class to elect representatives who should be charged with jury duty and bound to accept communal offices. Suffrage, according to his suggestion, should then be given to all the members of the first two classes and to the elected representatives of the third. (Verwaltung, Justiz, *etc.*, pp. 124, 125.) He also proposed the modification in the same sense of the three-class system in Prussia — a system which he disliked because it made suffrage independent of service and distributed voting power simply according to the amount of taxes paid. (*Ibid.*, p. 131.) He came back to this subject twenty-five years later in his Stände und Wahlsystem.

[2] For a study of both the old system and the new, *cf.* Goodnow, "Local Government in England" and "The English Local Government Bill," POLITICAL SCIENCE QUARTERLY, II, 638; III, 311. For Gneist's latest utterances on the subject, see Stände und Wahlsystem, pp. 149–169.

With the political philosophy which was developed to justify and further these changes he had no patience. Instead of basing power on service and regarding all political powers as duties, *i.e.*, as trusts, it treated these powers, suffrage and eligibility to office alike, as human rights based upon interests. The only logical outcome of this view, he declared, was universal suffrage — not manhood suffrage merely, but a vote, personally or through a guardian, for every man, woman and child in the nation, not excluding lunatics, paupers and criminals, since all of these had interests to protect. The interests of the inmates of asylums, workhouses and prisons, he dryly added, were of all the most urgent, because most directly affected by government. Gneist found the fullest and most lucid expression of the new political philosophy in Mill's *Representative Government*, and in criticising this book he clearly formulated his own antagonistic views.[1] He maintained that the only logical outcome of Mill's theories was the Napoleonic constitution, and that this was "the universal constitutional idea of the new industrial society."[2]

Gneist was not the only person of his generation who had found the chief defect of continental constitutionalism in the centralization of governmental power. De Tocqueville had expressed similar views and had urged decentralization, and so had other writers in other countries. But Gneist was the first to set forth the true character of English self-government and to show clearly what it was not: not local autonomy, which dissolves the state into a multitude of petty republics; not a descending series of provincial, departmental and local councils, equally incapable of conducting administration and of exercising any real control over the current administration conducted by professional officials; not manorial jurisdiction, associated with landed property. All these arrangements had been called self-government, and their respective advocates had imagined that their systems were at least akin to the English. Gneist's writings, Bornhak[3] tells us, put a stop to all these partisan appeals to English precedents.

[1] First in Repräsentativsystem, pp. 160, 161; more fully in Verwaltung, Justiz, *etc.*, pp. 52–60. [2] *Ibid.*, p. 60. [3] *Loc. cit.*, pp. iv, v, vi.

XI.

What Gneist really thought of parliamentary government as developed in England, whether he considered it on the whole a good thing or a bad thing, is to be read rather between the lines of his writings than in the form of direct statement.[1] He attributed the establishment of parliamentary government to the folly of the Stuarts, and he would probably have assented to the statement that, if England had possessed, during the last three centuries, a dynasty as capable and intelligent as the Hohenzollerns, parliamentary government would have been neither possible nor desirable.

That he did not desire the establishment of parliamentary government in Prussia or in Germany until a thorough system of self-government in the localities should have trained the people for public life, is made clear in all his writings. His experience in public life could have led him to no other view. Germany has not yet developed the first requisite for party government; it has no parties. It has only fractions, which often dissolve and recombine like the colors in a kaleidoscope. The instinct for party organization and the recognition of the necessity of party discipline are almost wholly wanting.[2] He would doubtless have conceded that the organization of strong parties, capable of assuming rule, could not be expected until there should be a prospect that, if organized, they would have a chance to rule; but he would still have insisted that the parties would be social, rather than political, until self-government in the localities had done its perfect work.

Gneist's assertion that parliamentary government was impracticable without self-government in the localities did not,

[1] A fair statement of the advantages and disadvantages of parliamentary government is to be found in Gneist's article in Holtzendorff, pp. 1454–1456.

[2] Of this defect Gneist was at times irritably conscious. During the passage through the Imperial Diet of the protective Tariff Bill of 1879, I asked him one evening how his party had voted that afternoon on the second reading of the measure. "Fifty-one for and fifty against," he replied, and added: "That is a pretty party. The hundred might as well have hired cabs and driven about the *Thiergarten*."

however, by any means imply that he regarded parliamentary government as even a distant goal of Liberal effort in his own country.[1] Many of his utterances indicate, on the contrary, that he assigned to monarchy permanent political functions. Like Lorenz Stein, he pronounced hereditary monarchy the purest expression of the state, because it raises the state above society. History, in his interpretation, shows that the bases of free states have always been laid by lawgivers invested with dictatorial or monarchic powers. It was so in the ancient world; it was so again in mediæval Europe. It by no means follows, however, that after the bases of the state have been established monarchy becomes superfluous. Great changes in the distribution of wealth and the resultant rearrangement of the social classes will always necessitate the readjustment of political and social relations, the "recombination of state and society." An elective assembly cannot do this work, for elective assemblies, particularly at such periods, represent interests; and the state cannot be built on a basis of interests: it must always be reconstructed, as it was originally constructed, on the basis of duties. The Norman monarchy laid the foundations of the English free state; the Parliaments of the nineteenth century undermined them. Prussian monarchy not only built the old Prussian state, but it also laid, in 1808, the bases for the new Prussia and the new Germany. It was to the Prussian monarchy that Gneist looked for the realization of his program of political reforms, because this program required the imposition of duties from which society would shrink; and it was the Prussian monarchy, as he afterwards declared, that had carried these reforms to a successful issue.[2]

One reason why Gneist had comparatively little to say regarding the question here raised — the question which exists

[1] He went furthest in his Stände und Wahlsystem, p. 271, claiming that the reformed Prussia possesses the firm bases "on which a House of Commons may develop into the highest council of the crown with a position of increasing power." This, however, does not mean parliamentary supremacy.

[2] *Cf.* History of the English Constitution, I, 16; Repräsentativsystem, p. 158; Eigenart des preussischen Staats, *passim*; Rechtsstaat, pp. 278, 279; Holtzendorff, p. 1465.

in republics, as well as in monarchies, and which we usually describe to-day as that of the relative superiority of presidential, as compared with cabinet, government — was doubtless that many of his friends in the Liberal party in fact looked forward (as Bismarck always said they did) to the establishment of parliamentary control over the crown, not merely in legislation and in finance but in every branch of administration, and that Gneist, as a good politician, desired to live, so far as possible, in harmony with his party associates. As it was, he was quite at odds with most of them concerning the financial powers of Parliament and the doctrine of ministerial responsibility. To them the power of the legislature to vote appropriations seemed a power to prevent the government from spending a penny of revenue without the authorization of the legislature and a means of making the ministers responsible to the legislature. Gneist showed, again and again, that the English House of Commons, in making appropriations, had never attempted to deal with anything more than a certain "mobile part" of the governmental expenditures; that expenditures authorized by law must be made, according to the English theory, until the law was changed; and that the refusal of subsidies to a mediæval king was a very different thing from an attempt to bring all the necessary work of the modern state to a standstill.[1] He drew a sharp distinction between the political responsibility of ministers to the legislature, which meant that system of parliamentary government for which neither Germany nor Prussia was prepared, and their legal responsibility, which meant that they ought to be amenable to legal procedure in case they should violate the law.

The chief reason, however, for Gneist's relative silence regarding the abstract desirability of parliamentary government was, doubtless, that constitutional problems were to him of less interest than administrative problems. To him, as to many jurists, political liberty seemed less important than legal liberty, *i.e.*, the protection of the personal and property rights of the individual. These forms of liberty, of course, are not

[1] Budget und Gesetz, 1867; Gesetz und Budget, 1879; Rechtsstaat, p. 343.

only distinct in theory, they are also separable in fact. Legal liberty may be effectively protected under governments of the absolute type, as was the case under the Antonines in the second century and under the Hohenzollerns in the eighteenth; it may, on the other hand, be trampled under foot by governments as popular in their constitution as was that of the French Convention. Legal liberty, as Gneist was never weary of insisting, is a thing that depends mainly on the kind and degree of control to which the administration is subjected, because the chief points of collision between government and private interests occur in the field of administration. The control must in first instance be legal, *i.e.*, the law must declare what the officers of administration may do and what they may not do. It must in second instance be judicial. The most admirably devised bills of rights will be vain things, and even detailed legal provisions intended to carry out the principles formulated in such bills of rights will be of uncertain efficacy, if the interpretation and enforcement of the law is left to administrative officers acting simply as administrative officers. The interpretation and enforcement of the law must be intrusted to authorities whose position and tenure make them independent of the administration and whose forms of procedure and decision are judicial. The ordinary courts, if properly constituted, are of course such authorities; but they are not the only possible authorities of the kind. Officers of the administration who are intrusted with judicial functions, whose procedure is judicial in its form and who enjoy the same independence against the central administration that is conferred upon the ordinary courts, become judicial officers, and permanent boards composed of such officers become courts. To what extent the interpretation of the law shall be left with the ordinary courts, to what extent it shall be intrusted to administrative courts — in other words, just how the judicial control of the administration shall be divided between these two classes of courts — is a secondary question, a question in the main of expediency.[1] The chief

[1] *Cf.* Goodnow, "The Executive and the Courts," POLITICAL SCIENCE QUARTERLY, I, 533.

thing is that the courts, whether ordinary or administrative, shall be really independent, and that they shall be intrusted with the powers necessary to protect individual rights against administrative power. Any state in which the rights of the individual are thus safeguarded against the administration by proper laws, interpreted and enforced by independent judicial authorities, is what Gneist calls a "jural state."

To us, on this side of the ocean, it seems that we have gone a step further. The jural state protects the individual against the misuse of administrative power; our constitutional state (a term to which we have given an entirely new meaning) seeks to protect the individual against the misuse of legislative power. Gneist, however, thought that this device of ours — safeguarding private rights by constitutional provisions and intrusting the enforcement of these provisions to the courts — was indeed a fair substitute for the conservative influences of monarchy and aristocracy, but that the inflexibility of our constitutional law unduly hampered legislation.[1]

The state that is not jural — the state in which, on the contrary, the protection of private rights is subordinated to considerations of public policy — is termed by Gneist the "welfare-state." Of this sort of state he found a typical example in France. The French failure to realize the jural state was ascribed by him in part to the national temper. When a great public end is to be gained, it is hard for a Frenchman to understand why such little things as private rights should be regarded, or why the courts should be permitted to impede the realization of the general will and the promotion of the general welfare. In this they are true to the Latin tradition which has always subjected *iurisdictio* to *imperium*.[2] The French point of view, however, is not peculiar to France; it is the natural social point of view. It is shared by every society that has not been educated by personal service to political consciousness. The French temper is largely ascribable to the defective character of French institutions, and the defects in these institutions are explained by the

[1] Soll der Richter, *etc.*, p. 23.

[2] Verwaltung, Justiz, *etc.*, p. 180.

history of the French state. The French monarchy did not harness the ruling classes of the feudal period into the service of the state. It did not impose upon them governmental duties, but simply thrust them aside or bought them off with privileges; and it secured the performance of the necessary functions of the state by hiring soldiers, judges and administrators. In restoring and perfecting the administrative system of the old monarchy, Napoleon acted completely in accordance with the will of the sovereign people, who knew no other mode of governing.[1] When, in the nineteenth century, the attempt was made to combine parliamentary government with this bureaucratic administration, private rights were exposed to greater perils than had menaced them under the old monarchy or under the dictatorship of Napoleon. The power of the centralized administration began to be used, not simply to carry out the purposes of the state, but to further the interests of parties, to reward the faithful, to punish the disaffected and, above all, to carry elections. For the protection of private rights France possessed, indeed, a highly developed system of courts. Even under the Second Empire, the ordinary courts were apparently independent of the administration, since the tenure and pay of the judges were secured by law; but the administration placed these judges where it pleased, transferred them, not simply from one court to another, but also from one section or chamber to another, and thus controlled the composition of the chambers by which special classes of cases were tried. In criminal procedure, moreover, where conflicts between private rights and public or party interests occur more frequently than in civil procedure, prosecution was in the hands of officials appointed and removed by the government; the preliminary investigation was conducted by a judge designated by the government; the bench that tried the accused was a bench constructed by the government, and the jury was a "committee of persons enjoying the confidence of the prefect." Certain precedents and considerations of decency restrained the government in the use of its power over the judiciary, but it was

[1] Verwaltung, Justiz, *etc.*, p. 181.

precisely when the abuse of this power was most dangerous that these safeguards became ineffective.[1]

The French administrative courts are admirably devised "to secure continuity of practice in the administrative field." They afford also a high degree of protection to property rights. In the Council of State, which is the highest administrative tribunal, the forms of judicial determination are scrupulously observed. The personnel, however, of the administrative courts and the composition of the sections of the Council of State by which controversies are decided are controlled by the ministry. In opposition to English practice, it is, moreover, the administration that raises all questions of competence between the civil and the administrative courts: cases are not removed from the administrative jurisdiction to the ordinary courts, but *vice versa*. Jurisdiction in questions of public law is almost wholly withdrawn from the ordinary courts and vested in the administrative courts. All this is in accordance with the principle of the separation of powers and secures "the independence of the executive branch." But the independence thus secured is practically supremacy.[2] The chief defect, however, in the French polity, as Gneist always insisted, is the lack, in the localities, of that self-government which not only makes internal administration independent of changing majorities and ministries but also trains the people to the right feeling for the state.[3]

Gneist's categories of the jural and the welfare state may be criticised on the ground that the distinction which they represent is not absolute, but relative. Every civilized state is more or less jural, and every civilized state is more or less a welfare

[1] Verwaltung, Justiz, *etc.*, pp. 181, 182. Gneist's criticism of the French judicial system was well founded for the period of the Second Empire; but the conditions were not so bad between 1820 and 1852, and in the present republic the courts and the juries have again been made independent of the administration. *Cf.* Flourens, Organisation judiciaire et administrative de la France, 1814–1875.

[2] Verwaltung, Justiz, *etc.*, pp. 182–184.

[3] *Cf.* Rechtsstaat, pp. 158–190. The decentralizing movement which was under way when Gneist published the second edition of the Rechtsstaat, and which has since been carried further, has not established what Gneist called self-government. The existing French system resembles that newer system of English local government which he regarded as an abandonment of self-government.

state: the difference between the two classes consists in the predominance of one or the other tendency. In his distinction there is, nevertheless, an element of universal and permanent truth. If we substitute for his jural state our constitutional state, which to us is simply his jural state raised to a higher power, his welfare state remains the expression of the opposite tendency; and the chief problem which the rule of our insular territories has forced upon us may be expressed in the terms of this antithesis. We are face to face with the question whether we, like the Romans, shall subordinate law-finding to empire. Fortunately for us, the decision, which is not yet rendered, rests not with the administration nor with Congress, but in the first instance with our highest court of justice and in the second instance with a people who, if Gneist's judgment was not mistaken, possess in a fair degree the jural consciousness.

XII.

In 1859 Gneist reëntered active political life as a member of the Prussian Chamber of Deputies, and in 1867 he became a member of the newly created Imperial Diet also. Reëlected with unfailing regularity for many years to both bodies, he was henceforth in a position to urge more effectively the reforms he had at heart. During the first seven years of his parliamentary life, however, the Prussian government and the deputies were not in such harmony as to make reform legislation possible. It was a time of internal conflict, during which the king reorganized the Prussian army in defiance of a hostile majority in the Chamber, and his ministry collected and disbursed the revenues of the state without parliamentary authorization. It was also a time of external conflict, during which the German question was solved by the expulsion of Austria from the German confederation and the establishment of a new federal state under Prussian hegemony. In the internal conflict Gneist took an active part, opposing as resolutely as any of his Liberal associates the unconstitutional acts of the ministry, but filing from time to time separate dissenting

opinions, in the form of speeches and pamphlets, to explain the grounds of his opposition. He did not fully share, as we have seen, the prevailing Liberal opinions regarding the financial powers of a parliamentary body; and he preferred to base his opposition to the ministry on the ground that in enlarging the army without the consent of the Chamber they were modifying by ordinance the conditions established by law. When Bismarck solved the German question, — a result at which Gneist was as much surprised as any of his Liberal associates, — Gneist went with the more moderate portion of his party into the new National Liberal party, which accepted Bismarck's generous terms of peace and acted in general concert with him for the next twelve years. Much as he came to admire the great chancellor, Gneist could never quite forget the bitterness of the years of conflict; and he always maintained — I have heard him assert it in the lecture room — that Bismarck solved the German question only because, in his contest with the Prussian Chamber, he had been forced into an *impasse* from which nothing but a successful foreign war could extricate him.

With the termination of the conflict and the establishment of harmonious relations between the Liberals and the government began a period of great legislative activity, in which Gneist took an important and, in some instances, a decisive part. His chief aim, of course, was the reform of Prussian local government. This problem was simplified, in his view, by the fact that the leading principles of self-government, as he understood them, had already been introduced into the government of the Prussian cities by the famous ordinance of 1808. Its author, Baron Stein, was himself familiar with English local government and had appreciated its essential features; and in the ordinance of 1808 he had given the cities an independent administration based on the compulsory and unpaid service of non-professional officials. The problem, in Gneist's opinion, was, therefore, to extend Stein's system of city government, with such modifications as might be required, to the open country. At the outset, however, hardly any one else viewed the matter in this way. Every one

was in favor of self-government in the localities, but there were great differences of opinion as to the meaning to be attached to the phrase. The Conservative party demanded the maintenance and extension of the manorial police system, which still survived in the eastern provinces. The Liberals generally desired the maintenance of professional service under a popular control, to be exercised by elected councils of the French type. The Prussian bureaucrats themselves desired to go on governing with much less interference on the part of the ministry. Gneist, however, found as early as 1868 a supporter whose single voice was easily worth the opinion of any one of these groups — the Prussian minister-president. A memorial drafted by Gneist in the summer of that year was presented by Bismarck to the ministry;[1] and although at the outset Gneist's plans found no other supporter, a bill abolishing manorial jurisdiction and creating a system of what we should call county and local government was gradually worked out, and this bill, after three years of discussion, became law in 1872.[2] It was first put into force in the eastern provinces of Prussia and then gradually extended with modifications to other provinces. Further laws passed in 1875 and 1876 reorganized the provincial administration on similar lines. Except that election was made to play a larger part than Gneist desired in the creation of the local and provincial authorities, and that the system was made more complex than he wished, these laws substantially realized his chief aims. They certainly represent a serious attempt to draw the well-to-do classes into the service of the state and to give them, through compulsory service, that political training which Gneist believed could be obtained in no other way. They represent also a serious attempt to make local government independent of central bureaucratic control.[3]

[1] Rechtsstaat, p. 359. The substance of this memorial was published by Gneist in 1870, under the title, Die preussische Kreisordnung. *Cf.* Gneist, "Les Reformes Administratives en Prusse," in the *Revue Générale de Droit, etc.* (Bucharest), I, 251. For the history of the reform see also his Verwaltungsreform in Preussen (1880) and Stände und Wahlsystem, pp. 208–215. [2] Kreisordnung, von, Dec. 13, 1872.

[3] For details of the reform, *cf.* Goodnow, "Local Government in Prussia," POLITICAL SCIENCE QUARTERLY, IV, 648; V, 124.

These laws provided at the same time for a reorganization and reform of administrative jurisdiction substantially in accordance with Gneist's ideas. As late as the beginning of the nineteenth century the Prussian administrative system was organized in a manner that gave very substantial protection to private rights; but the Stein-Hardenberg reforms and later laws based on French parliamentary theories so increased the power of the Prussian ministry as greatly to weaken the independence of the lower administrative instances; and, in consequence of the abolition of the Council of State, the final interpretation of law in administrative questions was placed wholly in the hands of the ministers. In connection with the reform of local and provincial government, from 1872 to 1876, administrative courts were organized in which the non-professional elements, the "honorary officers," have the controlling voice; and for final decision of all cases involving the interpretation of public law, and not falling within the competence of the ordinary courts, a superior administrative court was established at Berlin, with the same guaranties of independence and impartiality that exist in the case of the ordinary courts. Of this new court Gneist was very properly made a member.

To the control of the administration by law, Gneist regarded it as essential that the ordinary courts should have power to disregard an ordinance which trenched upon the field of law; and it was, in his opinion, one of the chief defects of the Prussian constitution that, in accordance with the Latin theory and in imitation of constitutions of the French type, it withheld this power from the judiciary. This mistake, however, was not repeated in the imperial constitution; and in Prussia the attribution of this power to the superior administrative court substantially remedied the evil, since the decision was taken out of the hands of the ministry and intrusted to a judicial body. It was essential, again, in Gneist's opinion, to the legal control of the administration that officials by whose acts or laches private persons had suffered in person or in purse should be subject to the ordinary processes of law —

not, of course, on account of injudicious exercise of their discretionary powers, but for acts beyond their competence or for neglect of their legal duties. In Prussia and in other German states, the liability of officials to civil suits and to criminal prosecutions had been unduly limited by laws passed during the first six decades of the nineteenth century. By imperial legislation, adopted in 1877, all these limitations are annulled or rendered innocuous.[1] At the same time, the administrative "monopoly of criminal prosecution," which Gneist had frequently reprehended, was modified by the imperial code of criminal procedure, which provides that, if the public prosecutor refuses to act, the injured party may apply to the highest state court or, in cases falling within the competence of the Imperial Court, to that tribunal, and that the court may order the prosecution of the alleged offender.[2]

It avails little to subject the administration by law to judicial control, if the judiciary is in law or in fact controlled by the administration. In Prussia, as Gneist repeatedly pointed out, the judiciary had been subjected, since 1851, to a ministerial control that really destroyed its independence. Not only had the Napoleonic device been introduced, by which the minister of justice placed judges where he pleased and formed the chambers into which the higher courts were divided, but the judges had also (again in imitation of the French practice) been made subject to disciplinary proceedings conducted by the administration; and the powers thus conferred upon the ministry had been employed, during the Conservative reaction and during the period of conflict, with a disregard of decency unexampled in France.[3] The return of such conditions was made impossible, and the independence of the judiciary was secured against all assaults, by the imperial law of judicial organization passed in 1877. In addition to the ordinary guaranties of judicial tenure and salary, it is provided in this law that judges may not even be retired on partial or full salary except under the conditions

[1] Einführungsgesetz zum Gerichtsverfassungsgesetze, sec. 11.

[2] Strafprocessordnung, secs. 169–173.

[3] Verwaltung, Justiz, *etc.*, pp. 184 *et seq.*; Freie Advocatur, pp. 29–49.

established by law or with their own consent, and that without their own consent they may not be transferred from one post to another, even when the transfer is a promotion. It is further provided that, while the number of chambers or senates in the state courts and in the Imperial Court is to be determined by the respective ministers of justice and by the imperial chancellor, the composition of these divisions and the distribution of business among them shall be determined by the courts themselves.[1]

Gneist had always maintained that by instinct and temper his countrymen were as well fitted as the English for self-government and the jural state. He had repeatedly demonstrated that the institutions of German absolute monarchy had never been as purely bureaucratic as those of France and that the idea of subjecting administration to law had never been permanently obscured. With the reforms above indicated, he felt that the chief bases of the jural state were securely laid.

There were, however, two things that still troubled him — two places in which the jural state was incomplete, both in Prussia and in the empire. Neither the ministers nor the army were subjected to due legal control. The ministers of the Prussian crown and the chancellor of the empire are declared, by express constitutional provisions, to be responsible; but neither in the Prussian nor in the imperial constitution, nor in any law, is it indicated to whom they are responsible or what their responsibility really signifies. Bismarck always declared that the Prussian ministers were responsible to the king, and the imperial chancellor to the emperor; and if the word be taken to mean politically responsible, his statement is true. Gneist took the word to mean legally responsible; and argued that if a minister or the chancellor violated the law, he ought to be impeached and tried. In the absence, however, of any law determining who may impeach and what tribunal shall try, he conceded that nothing could be done.[2] There the matter

[1] Gerichtsverfassungsgesetz, secs. 8, 61–68, 133.

[2] In Verwaltung, Justiz, *etc.*, p. 219, he expressed the opinion *de lege ferenda* for Prussia that the Chamber of Deputies should be intrusted with the impeachment, but that a special tribunal should be established for the trial, since the Herrenhaus was not the right sort of upper house for such cases.

still rests alike in Prussia and in the empire: the constitutional provision, in each case, remains what Gneist called it — a *lex imperfecta*.

The second open place in the German jural state is what Gneist described as "the practical exemption of the military authorities from legal control" and "the consequences drawn from the fiction of 'a military class.'" "Conditions," he pleaded, "should not persist in which the life, health, freedom and property of the people are placed in the hands of the military authorities without legal protection or judicial control." The idea should be abandoned that the army officers form a separate class, and their special forum should be abolished, at least in the case of ordinary crimes. Courts of honor he pronounced unnecessary; the ordinary military courts can dismiss an officer for conduct unbecoming a gentleman. "The English aristocracy is certainly not insensible to the real point of honor."[1] It is not likely that Gneist expected to witness these reforms; but they remain, for all that, permanent demands of the German Liberal program, and they are sure to be realized in time.

Law books, like all other technical works, become antiquated. Of their contents so much as is permanently true reappears, often without acknowledgment or even recollection of its first presentation, in a series of sequent treatises, each of which, in its time, is up to date, and each of which, after its time, passes into oblivion. This fate will probably be shared by Gneist's great work on the English constitution.

The literature of reform is even more ephemeral. The more successful it is, the sooner it ceases to find readers. The names, indeed, of successful advocates of important reforms are often preserved in history; but even in this matter there is an element of luck. Gneist's part in the work of establishing self-government in Prussia is the more likely to be underestimated because the reforms of 1872–76 will be viewed, and rightly viewed, as the completion of the reform of 1808.

[1] Verwaltung, Justiz, *etc.*, pp. 258 *et seq.*; Verwaltungsrecht, pp. 571–576.

Baron Stein will receive, in history, the credit of initiating the movement, Prince Bismarck that of completing it. In history the eminent results in any movement stand out with increasing clearness as they recede further into the past; but as they recede, they also draw nearer to each other, and the intervals shrink until sixty or seventy years in which nothing of consequence occurred seem as a day. It will therefore hardly be stated or even remembered by future historians that the origin and the meaning of Stein's reforms had to a great extent passed out of the consciousness of Gneist's generation; that in the middle of the nineteenth century the bases of municipal self-government which Stein had laid had been seriously weakened by unwise legislation; or that, for many years, Gneist was the only prominent advocate of the principles on which the reforms of 1808 were based.

Gneist's best title to remembrance will probably be found in his political doctrines. Had he possessed, as a writer, that indefinable quality which we call style, — a quality which often gives a long lease of life to a book that contains no ideas, and which causes a book that does contain ideas to be read for centuries, — he might have written a *Jural State* or some such book which would have made him one of the immortals. He would then not merely have been remembered as one of the most prominent representatives of the nineteenth century reaction against the exaggerated individualism of the time: he would have had a place forever among the great political teachers: for no man ever saw more clearly, felt more strongly or declared more insistently than he that states rest not on rights, but on duties, and that the citizen is not born, but trained; and these are permanent and fundamental truths that need to be reiterated to every generation.

MUNROE SMITH.